

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 53 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THE GRAND CONSOLIDATED FINANCE[GUJ.] LTD. - Petitioner(s)

Versus

SPECIALITIES PAPER LTD & 5 - Respondent(s)

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Appearance :

MR SHANTILAL M PATEL for Petitioner(s) : 1, MR AMRUTLAL SUTARIA for Petitioner(s) : 1,
None for Respondent(s) : 1, 5,
DELETED for Respondent(s) : 2 - 4, 6,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 23/03/2007

ORAL JUDGMENT

1. Present Company Petition has been filed by the petitioner – Grant Consolidated Finance (Guj.) Ltd. Under Section 433 of the Companies Act, 1956 for following reliefs:

“19(A)Your Lordship be pleased issue appropriate rate, order or direction for getting of Rs. 1,58,72,983/- for auction of respondent Company and explanation for non payment by the officer of the respondent Company;

19(B)Be pleased to issue for the direction or order through respondent No.1 and 5 for necessary action against the respondent not act contrary to the Rules & Regulations of the relevant acts of Companies and fundamental rights of the petitioner Company and implement of Sales of Goods Act and Contract act for recovery of dues and under Section of Companies Act – Section 433 for winding up of the respondent Company.

19(C)Respondent State machinery seems to be plying convenient on the subject matter, they are called for reply.

19(D)Direction to payment of dues to the respondent Company with the interest.

19(E)Direction to all responsible officer and irregularities of the executives of the Company for mismanagement of fund.

19(F)To grant any other appropriate and just relief.”

At the outset it is required to be noted that initially the petitioner has joined Managing Director, The Specialties Papers Limited, Registrar of Companies, Securities and Exchange Board of India, The Cosmos Co-op. Bank Limited, State of Gujarat as party – respondents. However, considering the fact that the present Company Petition is filed under Section 433 of the Companies Act, 1956, except Company other respondents were not properly joined, therefore, the learned Advocate

appearing on behalf of the petitioner sought permission to delete respondent Nos. 2,3,4 and 6 and also sought permission to amend cause title of respondent No.1. By order dated 06.03.2007, this Court granted permission to delete respondent Nos. 2,3,4 and 6 and to amend cause title of respondent No.1.

2. By way of this petition, the petitioner has prayed for an appropriate order directing the respondent – Company to pay an amount of Rs. 1,58,72,983/- (Rupees One Crore Fifty Eight Lacs Seventy Two Thousand Nine Hundred and Eighty Three only) towards professional fees / mismanagement of funds by the respondent – Company. On going through the pleadings and averments in the Company Petition, it is not possible to cull out what is the request of the petitioner. At some place, the petitioner has submitted that there is mismanagement of funds for which the Company is required to be wound up in exercise of powers under Section 398 of the Companies Act, 1956 and at some place it is mentioned that as the professional bills for getting finance is not paid by the respondent – Company, appropriate order be passed directing the respondent – Company to pay the same to the petitioner and / or to pass an order of winding up under Section 433 of the Companies Act, 1956.

3. On going through the averments in the application, annexures, correspondence and notices issued by the learned Advocate

appearing on behalf of the petitioner and reply thereto, it appears that it is the case on behalf of the petitioner that there is an agreement between the petitioner and the respondent – Company, the petitioner was required to get finance and the petitioner agreed for the same, and, therefore, the petitioner was entitled to Rs. 1,01,00,000/- (Rupees One Crore One Lac) for which they have issued debit bill dated 27.03.2003 (it should be 27.03.2004). It is the case on behalf of the petitioner that after the debit note dated 27.03.2004, by notice dated 10.05.2004 the respondent – Company was called upon to make payment of Rs. 1,01,00,00/- (Rupees One Crore One Lac). It is the case on behalf of the petitioner that thereafter, they have served reminders and last notice served upon the respondent was 25.01.2007, which was for winding up under Section 433 of the Companies Act, 1956. It is the contention on behalf of the petitioner that as an amount of Rs. 1,58,72,983/- (Rupees One Crore Fifty Eight Lacs Seventy Two Thousand Nine Hundred and Eighty Three only) is not paid to the petitioner – Company, it is requested to pass an order directing the respondent – company to make payment of Rs. Rs. 1,58,72,983/- (Rupees One Crore Fifty Eight Lacs Seventy Two Thousand Nine Hundred and Eighty Three only) to the petitioner and /or to pass appropriate order to winding up of the Company under Section 433 of the Companies Act, 1956.

4. On going through the correspondence, it appears that debit

note was served upon the respondent – Company for an amount of Rs. 1,01,00,000/- dated 27.03.2003 (Annexure – A to the petition) and thereafter, the petitioner served legal notice through its advocate upon the respondent – Company dated 10.05.2004 calling upon the respondent -Company to pay Rs. 1,01,00,000/-

5. It appears from the record that the respondent – Company replied to the notice dated 10.05.2004 vide reply dated 12.06.2004 denying the claim made by the petitioner and it has been submitted in the reply that they denied that:

- (a) they misused the bank guarantee as alleged;
- (b) respondent – Company did not withdraw the funds as alleged;
- (c) the respondent – Company did not complete the formalities as alleged;
- (d) the respondent – Company is liable to pay to the petitioner the cost as alleged.

In the said reply, it has specifically denied their liability to pay Rs. 1,01,00,000/- as per the debit bill. It is specifically mentioned in the reply that since the petitioner failed and defaulted in complying with the obligations as per the provisions of the agreement, the respondent – Company is not liable to comply with the obligations as therein mentioned. It is specifically mentioned in the reply that claims purported to have been raised are totally false and baseless.

6. It appears that thereafter, the petitioner Company again send one notice dated 25.09.2006 alleging mismanagement of funds by the Directors by submitting that the Directors will be held responsible for mismanagement of funds of Rs. 1,51,17,983/- as per Section 398 of the Companies Act, 1956 and by notice dated 25.09.2006, the respondent Company was called upon to pay Rs. 1,51,17,983/-, that; thereafter, again notice dated 25.01.2007 was served upon the respondent Company calling upon the respondent Company to pay Rs. 1,58,72,983/, failing which action would be taken against the respondent Company by filing Writ Petition under the Companies Act, under Section 433 for Winding Up Petition for debts, and mismanagement of the Company under the Companies Act, 1956 and thereafter, present Company Petition has been filed.

7. As stated above, the petitioner – Company has prayed for an appropriate order directing the respondent – Company to pay an amount of Rs. 1,58,72,983/-. It is also required to be noted that initially, debit bill dated 27.03.2003, was of an amount of Rs. 1,01,00,000/- and by subsequent notice it was increased to Rs. 1,51,17,983/- and Rs. 1,58,72,983/-. It is required to be noted that this Court is not required to pass decree. The prayer of the petitioner is as if the petitioner has filed suit for recovery of the amount against the respondent – Company. On going through the entire pleadings and averments and the

correspondence, it appears that there is dispute with regard to the debt and the respondent Company has denied its liability to pay any amount. Debt itself is not admitted. At one place, the petitioner Company has submitted that there is mismanagement of funds by the Directors and therefore, the Company is required to be wound up under Section 398 of the Companies Act, 1956.

8. It is required to be noted that earlier the petitioner had filed Company Petition under Section 398 of the Companies Act. However, as the petitioner was neither member, shareholder or Director, the Company Petition was not maintainable at the instance of the petitioner, the petition was withdrawn and thereafter, present Company Petition has been filed for the aforesaid reliefs.

9. As stated above, the debit bill is not admitted and there are dispute with regard to liability of the respondent – Company. From the reply, it appears that it is the case on behalf of the respondent – Company that petitioner has failed and neglected in complying with the obligations as per the provisions of the agreement.

10. In the case of *Pradeshya Industrial and Investment Corporation of Uttar Pradesh Vs. North India Petro Chemical Ltd. And Another, [supra]*, the Supreme Court has held that, “A debt for the

purpose of Section 433(e) of the Companies Act must be a determined or a definite sum of money payable immediately or at a future date.”

In the said Judgment, the Hon'ble Supreme Court considered the following observations of the Hon'ble Supreme Court made in ***Madhusudan Gordhandas and Co.***[1972] 42 Comp.Cases 125;

“Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See London and Paris Banking Corporation, In re [1875] LR 19 Eq.444). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See Brighton Club and Norfolk Hotel Co.Ltd., In re [1865] 35 Beav. 204).

Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt. (See A Company, In re [1894] 94 SJ 369; [1894] 2 Ch 349 (Ch D)).

Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely. (See Tweeds Garages Ltd., In re [1962] Ch 406; [1962] 32 Comp Gas 795 (Ch D)). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends.

Another rule which the court follows is that if there is opposition to the making of the winding-up order by the creditors the court will consider their wishes and may decline to make the winding-up order. Under section 557 of the Companies Act, 1956, in all matters relating to the winding-up of the company the court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered, though, perhaps, the court may attach greater weight to the views of the creditors. The law on this point is stated in Palmer's Company Law, 21st edition, page 742, as follows :

“This right to a winding-up order is, however,

qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some goods reason, they object to a winding-up order, the court in its discretion may refuse the order.'

The wishes of the creditors will, however, be tested by the court on the grounds as to whether the case of the persons opposing the winding-up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding -up order is made. It is also well-settled that a winding-up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case. (See P & J. Macrae Ltd. In re [1961] 1 All ER 302; [1961] 31 Comp Cas 424 (CA)."

It is beyond dispute that the machinery for winding up will not be allowed to be utilized merely as a means for realising its debts due from a company. In Amalgamated Commercial Traders (P.) Ltd. vs. Krishnaswami (A.C.K.) [1965] 35 Comp Cas 456, 463 (SC) this court quoted with approval the following passage from Buckley on the

Companies Acts, 13th edition, page 451 :

“It is well-settled that a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed, and under circumstances may be stigmated as a scandalous abuse of the process of the court.”

11. Similar view has been expressed by the Hon'ble Supreme Court in the case of ***Mediqup Systems Pvt.Ltd. [supra]***, and the Hon'ble Supreme Court has observed that, *An order under section 433(e) of the Companies Act, 1956 is discretionary. There must be a debt due and the company must be unable to pay it.* It is further observed that, *A debt under this section must be a determined or definite sum of money payable immediately.* It is also held that if the debt is bona fide disputed and the defence is a substantial one, the court will not pass an order of winding up the company. The Division Bench of this Court also in the case of ***Tata Iron & Steel Company Ltd. v. Micro Forge (India) Ltd., [supra]*** has laid down certain general principles in a case of winding-up proceedings and after considering various decisions of the Hon'ble Supreme Court, more particularly in the case of ***Madhusudan***

Gordhandas & Co. vs. Madhu Woollen Industries Pvt.Ltd. [supra]; Harinagar Sugar Mills v. Court Receiver, H.C. Bombay, AIR 1966 SC 1707; Pradeshiya Industrial & Investment Corporation of U.P. vs. North India Petrochemicals Ltd. 1994 (3) SCC 348, the judgment of the learned Single Judge of this Court in the case of *American Express Bank Ltd. v. Core Health Care Ltd. 1999 (96) Comp.Cases 841*; and another decision of this Court in the case of *Ashok Fashions vs. Magdoot Acid & Chemicals (Guj.)*, 1998 (91) Comp.Cases 655, the order passed by the learned Single Judge admitting the winding up petition came to be set aside by holding that when there exists bona fide disputes and the dues are not admitted the winding-up petition is required to be dismissed.

12. For the reasons stated above, present Company Petition for winding up of Company is required to be dismissed, more particularly, when no case is made out for winding up of the respondent Company under Section 433 of the Companies Act, 1956. Under the circumstances, present Company Petition is dismissed.

[M.R.Shah, J.]

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